

Two preliminary hearings have been held in this case. At the first preliminary hearing, held October 27, 1998, claimant testified that she injured her low back while stocking beer on the evening of July 29, 1998. Claimant testified she stocked the beer and took out the trash before she left. Claimant worked the next three days—Thursday, Friday, and Saturday—but left early Saturday and has not worked since.

At the first hearing, respondent produced several witnesses who provided testimony that contradicted claimant's version of the events. In particular, Ms. Tonya Cunningham, who worked the shift before claimant came to work, testified claimant called before claimant came to work and asked for relief on the 29th because she was having back problems. She testified claimant could hardly walk when she came in on the 29th. She also testified claimant did not stock the beer or take out the trash on the 29th. Ms. Sarah Heise testified she overheard claimant apologize, on Thursday the 30th, for not stocking the beer and not taking out the trash the evening before. Ms. Anita Maichel testified she saw claimant limping on the 29th and claimant told her she injured her back at home. Claimant did not recall whether she saw her chiropractor, Dr. Patrick E. Murphy, on the date of the alleged accident, but the records indicated she had.

The Administrative Law Judge denied the claim following the first preliminary hearing.

After the initial denial, claimant took the deposition of Dr. Murphy, the chiropractor who saw claimant on the day of the alleged accident of July 29 and on July 31 and several other occasions after the accident. Dr. Murphy testified that he saw claimant at 4:30 p.m. on July 29. Claimant would have gone to work immediately after seeing Dr. Murphy. She worked from 5 p.m. to closing. Dr. Murphy testified that there was a marked change in claimant's condition which occurred between the time he saw claimant on the 29th and when he saw her on the 31st. On the 29th, she had thoracic pain, neck pain, shoulder pain, and low back pain. He did a general back adjustment. On the 31st, she walked with a guarded gait, had severe spasms, and had sciatic nerve pain on the right. None of these conditions existed on the 29th.

Claimant also presented, for purposes of the second preliminary hearing, testimony of Karen Lamond, the person who schedules for Dr. Murphy. She recalled that claimant came in on the 31st without an appointment but in severe pain. Claimant said she had been hurt at work but at this point did not want to turn in a workers compensation claim because she thought it might go away.

After the second preliminary hearing, the Administrative Law Judge granted benefits.

As is apparent from the above recitation of the facts, the testimony conflicts. Some of the contradictions might be explained by confusion about dates and/or other misunderstandings, but in the end it appears there remains a direct conflict between the claimant's testimony and the testimony of the coworkers. In the end, the decision in this case turns on an assessment of the credibility of the witnesses, many of whom appeared before the Administrative Law Judge. The Board generally defers to the Administrative Law Judge's assessment of credibility and will do so here. If believed, claimant's testimony, which is supported by the testimony of Dr. Murphy and Karen Lamond, establishes that claimant suffered accidental injury arising out of and in the course of employment.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Brad E. Avery on April 15, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
James M. Crawl, Topeka, KS
Jason Hoffman, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director